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No. 82-357

In the Supreme Court of the United States

OCTOBER TERM, 1983

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

vs

RAYMOND CLIFFORD AND EMMA JEAN CLIFFORD,
Respondents.

Michigan Supreme Court No. 62905
Michigan Court of Appeals No. 48278
Detroit Recorder's Court No. 80-07405

PETITIONER'S REPLY TO RESPONDENTS MOTION TO VACATE WRIT OF CERTIORARI

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STATEMENT OF THE QUESTION

ARE THE ISSUES AS PRESENTED PROPERLY BEFORE THIS COURT?

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported and is appended to the petition for certiorari as Appendix A. The order denying leave to appeal by the Michigan Supreme Court is appended to the petition as Appendix B.

STATEMENT OF JURISDICTION

The opinion of the Michigan Court of Appeals was issued March 29, 1982. The Michigan Supreme Court denied leave on June 29, 1982. The jurisdiction of the Court is invoked by petitioner under 28 USC §1257(3) and *California v Stewart,* decided sub nom *Miranda v Arizona,* 384 US 436 (1966).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, reported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment to the United States Constitution provides in pertinent part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction of equal protection of the laws.

THE ISSUES RAISED ARE PROPERLY BEFORE THIS COURT

Respondent argues that the issues presented are not properly before this Court because they were not presented below. In so doing, Respondent misperceives the import of the "not pressed or passed upon below" doctrine and ignores the procedural history of this case. Petitioner will briefly demonstrate that the issues presented are properly before this Court.

First, Respondent misperceives the "not pressed or passed upon below" doctrine. It has long been settled that this doctrine does *not* mean that every *argument* in support of an issue must have been pressed and passed upon below so long as the *issue* was pressed and passed upon below. In *Dewey v Des Moines,* 173 US 193, 197-198 (1898) this Court said:

> If the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form *but another ground or reason* for alleging the invalidity of the personal judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued. *Parties are not confined here to the same arguments which were advanced*

> *in the courts below upon a federal question there discussed* (emphasis added).

See also *Stanley v Illinois*, 405 US 104 (1972)

The *issue* in this case is whether the search here in question violated the Fourth Amendment, and, if so, whether exclusion of the evidence is the appropriate remedy. Both these issues were presented in the state appellate system, where petitioner argued that the search in question fell within *Michigan v Tyler*, 436 US 499 (1978), and that a "but/for" exception to the exclusionary rule should be created. In this Court Petitioner, not being "confined to the same arguments which were advanced in the courts below upon a federal question there discussed," has alleged "another ground or reason" why the judgment should be reversed. Such is wholly proper. Moreover, the Michigan Supreme Court was without authority to set aside this Court's decision in *Tyler*. Petitioner's raising this ground before this Court makes consummate sense.

Respondent takes Petitioner to task for not requesting the Michigan Courts to overrule *Tyler* on the ground that had Petitioner done so, Respondent could have urged the Michigan appellate courts to base their decisions on the Michigan constitution. Respondent ignores the procedural history of this case. Defendant was bound over for trial. It was *respondent* who sought an interlocutory appeal in the Michigan Court of Appeals, and it was Respondent who framed the Fourth Amendment issue and failed to raise any issue under the Michigan Constitution. Defendant's having received an unfavorable ruling based on the Fourth Amendment is certainly no reason for Petitioner to frame the issue in terms of the Michigan Constitution. Quite naturally, Petitioner appealed from the decision rendered on the grounds rendered. Moreover, should this Court find merit in either of

Petitioner's arguments, the Michigan Court of Appeals and Supreme Court would be free on remand to adopt a different standard under the Michigan Constitution if so desired. Petitioner would point out that the Michigan Supreme Court was free so to do when this Court remanded after the decision in *Michigan v Tyler*, and the Michigan Supreme Court did *not* see fit to adopt a different standard based on the Michigan Constitution.

Because the Fourth Amendment issue was before the Michigan courts, and because Petitioner has simply raised additional grounds or reasons why the Michigan Court of Appeals ruling on a federal issue ought to be reversed (and has done so before the only Court with the power to embrace the arguments), Respondent's complaints are without merit.

CONCLUSION

For the foregoing reasons, Petitioner submits that the issues are properly before this Court, and requests that the judgment below be vacated and the case remanded.

Respectfully submitted,

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